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NAFTA: The Best Friend of an Intellectual Property Right Holder Can Become Better

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NAFTA: THE BEST FRIEND OF AN INTELLECTUAL
PROPERTY RIGHT HOLDER CAN BECOME BETTER

*Neil Jetter**

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I. INTRODUCTION

The globalization of the world economy underscores the importance of international trade and trade agreements. In the past twenty years, the value of trade in the U.S. economy has risen from 13% to 31%.¹ Intellectual property, such as computer software, has seen dramatic recent growth.² But this growth has been limited by inadequate intellectual property protection.³ Without effective intellectual property protection, investors may choose to avoid expanding into unprotected markets.⁴ The implementation of the North American Free Trade Agreement (NAFTA) represents a significant

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1. U.S. Trade Representative Mickey Kantor, Remarks at the *Business Week* Magazine's CEO Symposium at the Willard Hotel (Sept. 28, 1995), available in LEXIS, News Library, FEDNEW File [hereinafter Kantor].

2. *USA: Strong IP Protection Critical to Successful GII*, Businesswire, June 30, 1995, available in WESTLAW, INT-NEWS database. For example, according to the U.S. Department of Commerce, Latin America is the second fastest growing market for packaged software, with annual increases of 18% predicted for the next four years. *Id.*

3. *Id.*

4. *Id.*

attempt to address intellectual property protection, including trade-related issues.⁵

On January 1, 1994, NAFTA became operative, joining Canada, Mexico, and the United States in one of the most comprehensive trade agreements in history.⁶ NAFTA established a "free trade area" among member nations and incorporated the following stated objectives: the elimination of trade barriers; the promotion of fair competition; increased investment opportunities; the protection and enforcement of intellectual property rights; the creation of procedures to administer and implement the agreement; and the establishment of a framework to expand and enhance the benefits of the agreement.⁷ In regards to intellectual property, Chapter Seventeen of NAFTA is devoted exclusively to providing a uniform minimum standard of intellectual property law and enforcement under which member nations must operate.⁸

NAFTA's intellectual property provisions significantly strengthen the intellectual property protection between the signatories, but substantive problems and practical concerns may limit its effectiveness.⁹ The Cultural Industries Exclusion (contained in the NAFTA chapter exceptions) allows Canada to ignore NAFTA intellectual property obligations in most music, radio, television, print, film or video industries.¹⁰ In addition, NAFTA does not address the problem of the "gray market" or "parallel importing" of goods.¹¹ Finally, some commentators have expressed doubt whether local Mexican agencies responsible with enforcing NAFTA procedures will be sufficiently funded to investigate, to identify and to ultimately prosecute infringers.¹²

5. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 605 [hereinafter NAFTA].

6. *Id.* art. 2203, at 702.

7. See NAFTA, *supra* note 5, arts. 101-05, at 297-98.

8. NAFTA, *supra* note 5, art. 1701(2), at 671.

9. Kevin M. Jordan, Comment, *Intellectual Property Under NAFTA: Is Chile Up to the Challenge?*, 2 TULSA J. COMP. & INT'L L. 376, 379 (1995).

10. NAFTA, *supra* note 5, art. 2106, Annex 2106, at 701-02.

11. George Y. Gonzalez, *An Analysis of the Legal Implications of the Intellectual Property Provisions of the North American Free Trade Agreement*, 34 HARV. INT'L L.J. 305, 305 (1993).

12. See John B. McKnight & Carlos Muggenburg R.V., *Mexico's Industrial Property and Copyright Laws: Attracting Business with the Increased Protection of Intellectual Property Rights*, 8 NEWSL. OF THE INT'L L. SEC. (State Bar of Tex.), July 1992, at 24, 32, where the authors state: "[T]he current administration of President Carlos Salinas has recently taken a number of dramatic steps to attract foreign business to Mexico"

II. BACKGROUND

A. *Intellectual Property Provisions of NAFTA*

Chapter Seventeen of NAFTA implements a fairly comprehensive set of minimum intellectual property protections by incorporating the substantive provisions of several preexisting intellectual property convention agreements.¹³ In addition, each party is designated to enforce the intellectual property rights within its own territory.¹⁴ Article 1702 allows a party to implement more stringent intellectual property protections as long as they are consistent with the agreement.¹⁵

Each party is required to accord foreign nationals the same protection as its own nationals with regard to protection and enforcement of intellectual property rights.¹⁶ NAFTA specifically addresses protected intellectual property rights in Articles 1705 through 1713.¹⁷ Articles 1714 through

13. NAFTA, *supra* note 5, art. 1701(2), at 671. This article expressly incorporates four conventions by reference:

(1) the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, Oct. 29, 1971, 866 U.N.T.S. 67 [hereinafter Geneva Convention];

(2) the Berne Convention for the Protection of Literary and Artistic Works, *revised* July 14, 1967, 828 U.N.T.S. 221 [hereinafter Berne Convention];

(3) the Paris Convention for the Protection of Industrial Property, *revised* July 14, 1967, 828 U.N.T.S. 305 [hereinafter Paris Convention];

(4) the International Convention for the Protection of New Varieties of Plants, Dec. 2, 1961, 815 U.N.T.S. 84 [hereinafter UPOV Convention].

14. NAFTA, *supra* note 5, art. 1714-1718, at 676-79.

15. *Id.* art. 1702, at 671.

16. *Id.* art. 1703, at 671.

17. *Id.* arts. 1705-1713, at 671-76.

Article 1705, "Copyright," adopts Article 2 of the Berne Convention and expressly states that computer programs are literary works subject to protection. *Id.* at 671-72. If the period of protection is not measured by a life, it is protected for at least 50 years. *Id.*

Article 1706, "Sound Recordings," protects the producer of sound recordings with the exclusive right to authorize or prohibit reproductions, importation of copies, first public distribution, and rentals. *Id.* at 672. The term of protection is for at least 50 years. *Id.*

Article 1707 is entitled "Encrypted Program-Carrying Satellite Signals." *Id.* It is a criminal offense to manufacture, import, sell, lease, or otherwise make available devices to decode without authorization satellite signals and a civil offense to receive such unauthorized signals. *Id.*

Article 1708, "Trademarks," requires each Party to provide the right to prevent unauthorized persons from using a registered trademark or one identical or similar if it would tend to lead to confusion. *Id.* at 672-73. The protection of a registered trademark is for a term of at least 10 years and renewable for additional 10-year periods. *Id.*

Article 1709, "Patents," requires the Parties to make available patents for "new" inventions for nationals from Member States of NAFTA. *Id.* at 673-74. Some exceptions are listed. *Id.* The period of protection will be at least 20 years from the date of filing or 17 years from the date of the grant. *Id.*

1718 address enforcement procedures.¹⁸

Enforcement procedures are available under domestic law to permit effective action against any act of infringement.¹⁹ Consequently, separate judicial systems are not required to enforce intellectual property rights distinct from each party's system for enforcement of laws in general.²⁰ Specific rules of civil procedure for judicial and administrative hearings have been adopted by each party for willful illegal acts.²¹ Criminal procedures and penalties also have been enacted by each party for willful illegal acts.²² NAFTA also provides added protection that allows a "right holder" with valid grounds for suspicion to enforce his or her intellectual property rights at the border.²³ Mexico has agreed to comply with the border provision on or before December 17, 1975.²⁴

B. *Omissions and Exceptions to NAFTA's Intellectual Property Chapter*

NAFTA does not address the issue of gray market goods.²⁵ Gray market goods are authentic goods produced and sold by the rightful intellectual property right owner who has licensed his product in a second country. The buyer, called the parallel importer, imports the goods into another country and sells the licensed product without a license in the importing country.²⁶ The parallel importer bypasses the cost of the licensing fee paid to the actual owner of the underlying property right and undercuts the authorized licensee in the importing country.²⁷ Besides failing

Article 1710, "Semiconductor Integrated Circuits," protects layout designs (topographies) of integrated circuits pursuant to various Articles in the Treaty on Intellectual Property in Respect of Integrated Circuits as opened for signature on May 26, 1989. *Id.* at 674-75. It is unlawful for any person without the owner's authorization to import, sell or otherwise distribute certain products related to layout designs. *Id.* Mexico will be subject to this provision on or before January 1, 1998. *Id.* Annex 1710.9, at 681.

Article 1711, "Trade Secrets," establishes standards to prevent any person from disclosing, acquiring, or using without the owner's consent certain trade secrets "in a manner contrary to honest commercial practices . . ." *Id.* at 675. No party may place a time limit on the duration of protection of a trade secret. *Id.*

Article 1713, "Industrial Designs," requires each Party to provide protection to independently created industrial designs that are new or original. *Id.* at 676. These designs may include textiles and other manufactured products. *Id.* A period of at least 10 years is available for protection. *Id.*

18. *Id.* arts. 1714-1718, at 676-79.

19. *Id.* art. 1714, at 676.

20. *Id.*

21. *Id.* arts. 1715-1716, at 677-78.

22. *Id.* art. 1717, at 678.

23. *Id.* art. 1718, at 678-79.

24. *Id.* Annex 1718.14, at 681.

25. Gonzalez, *supra* note 11, at 307.

26. *Id.*

27. *Id.*

to address parallel importing, NAFTA explicitly grants Canada an exclusion to bypass some NAFTA intellectual property protections afforded foreign nationals in Canada.

The Cultural Industries Exclusion is contained in NAFTA's chapter entitled "Exceptions."²⁸ This exception allows Canada to bypass intellectual property obligations imposed by NAFTA that exceed the reach of Canada's previous international agreements regarding "cultural industries" such as television and radio.²⁹ This exception allows Canada to virtually eliminate domestic market access to U.S. broadcasting, film, publishing and recording companies.³⁰ This broad based exclusion is highly protectionist and nullifies some important benefits granted by NAFTA's intellectual property provisions.³¹

III. ANALYSIS

A. *NAFTA's Scope Compared to the Berne and Paris Conventions*

NAFTA's scope of intellectual property is broader than that of international treaties that constitute the minimum intellectual property provisions of NAFTA. For example, the Berne Convention for the Protection of Literary and Artistic Works does not include protection of sound recordings.³² In contrast, NAFTA implements extensive protection for sound recordings for at least fifty years.³³ The Paris Convention for the Protection of Industrial Property fails to protect trade secrets, semiconductor layout designs, or biotechnology patents.³⁴ In comparison, NAFTA implements protection for trade secrets,³⁵ semiconductor integrated circuit designs,³⁶ and an extensive array of patents, including biotechnology patents.³⁷

B. *NAFTA's Scope Compared to the Domestic Laws of Canada and Mexico*

NAFTA also provides a broader scope of intellectual property rights protection than the domestic intellectual property laws of Canada and

28. NAFTA, *supra* note 5, art. 2106, Annex 2106, at 701-02.

29. *Id.* art. 2106, at 701.

30. Jordan, *supra* note 9, at 378.

31. *Id.*

32. See Berne Convention, *supra* note 13.

33. NAFTA, *supra* note 5, art. 1706, at 672.

34. See Paris Convention, *supra* note 13.

35. NAFTA, *supra* note 5, art. 1711, at 675.

36. *Id.* art. 1710, at 674-75.

37. *Id.* art. 1709, at 673-74.

Mexico.³⁸ Under Mexican law, trade secrets and semiconductor and biotechnology patents are not directly protected by specific statutory reference rendering their protection uncertain.³⁹ Furthermore, although computer programs are provided some protection, no protection is explicitly offered to raw databases.⁴⁰

The domestic laws of Canada also fail to protect some important intellectual property rights protected by NAFTA.⁴¹ Semiconductor chips are not protected at all under Canadian copyright laws.⁴² In addition, transitory broadcasts and collective marks are excluded from copyright protection.⁴³

In contrast to cited weaknesses in the scope of intellectual property protection afforded by the domestic laws of Canada and Mexico, NAFTA provides extensive protection for trade secrets, semiconductor patents, biotechnology patents, complicated data, trademarks, and transitory broadcasts.⁴⁴ NAFTA also protects works not yet specifically defined prior to invention.⁴⁵ The scope of NAFTA's protection in Chapter Seventeen is truly extensive. Chapter Seventeen also includes enforcement provisions to realize the protections detailed in this Chapter.

C. *NAFTA's Enforcement Provisions Compared to the Canadian and Mexican Law*

NAFTA provides enhanced enforcement provisions beyond the domestic laws of Canada or Mexico.⁴⁶ Mexican law fails to provide injunctive relief for infringement claims, delaying corrective action and often compounding

38. Karen K. Waller, *NAFTA: The Latest Gun in the Fight to Protect International Intellectual Property Rights*, 13 DICK. J. INT'L L. 347, 353-68 (1995).

39. *Id.* at 358.

40. *Id.* at 355.

41. *See Id.* at 360.

42. *Id.*

43. *Id.*

The term "collective mark" means a trademark or service mark —

(1) used by the members of a cooperative, an association, or other collective group or organization, or

(2) which such cooperative, association, or other collective group or organization has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, and includes marks indicating membership in a union, an association, or other organization.

15 U.S.C. § 1127 (1994).

44. NAFTA, *supra* note 5, ch. 17, at 670-81.

45. *Id.* art. 1709(1), at 673 ("[E]ach Party shall make patents available for any inventions, whether products or processes, in all fields of technology, provided that such inventions are new, result from an inventive step and are capable of industrial application.").

46. Waller, *supra* note 38, at 375-79; NAFTA *supra* note 5, arts. 1714-1718, at 676-79.

damages.⁴⁷ Further, criminal prosecution for copyright infringement in Mexico requires proving the defendant had a "profit motive."⁴⁸ Proving a profit motive complicates the prosecution and may make only the most prolific thieves vulnerable to successful criminal prosecution. Canadian law also limits trademark infringement to civil remedies.⁴⁹ Most trademark infringers in Canada will most likely not be persuaded to respect an owner's trademark rights based on only a limited threat of a civil judgement.

In contrast, NAFTA's strong enforcement provisions are explicitly defined.⁵⁰ Dispute resolution procedures also are clearly defined,⁵¹ as well as specific rules of civil procedure for both judicial and administrative proceedings for the parties.⁵² Criminal actions and penalties are available for willful illegal acts.⁵³ Further, a "right holder" with valid grounds for suspicion can stop "infringing goods" at the border by making a prima facie case for infringement and providing a security instrument, such as a bond, to protect the rights of a defendant from possible abuse.⁵⁴ Unfortunately, Mexico has yet to comply with the border protection provisions and was required to comply by December 17, 1995.⁵⁵ Although NAFTA represents a substantial improvement over both existing international intellectual property treaties and domestic intellectual property protection laws of Canada and Mexico, it fails to address the gray market problem of parallel importing.⁵⁶

D. *The Parallel Importation Problem*

Parallel importation of gray market goods involves the importing of genuine copyrighted products for sale by an unauthorized distributor in the importing nation.⁵⁷ Neither NAFTA nor the United States provides protection for parallel importation.⁵⁸ The worldwide loss from gray market goods was estimated at up to \$10 billion in 1985.⁵⁹ The parallel marketer undercuts the legitimate authorized distributor by offering authentic goods at a lower price. However, the underlying trademark owners do profit from the

47. Waller, *supra* note 38, at 378.

48. *Id.*

49. *Id.*

50. NAFTA, *supra* note 5, art. 1714, at 676.

51. *Id.* arts. 1714-15, 1717, at 676-78.

52. *Id.* arts. 1715-16, at 677-78.

53. *Id.* art. 1717, at 678.

54. *Id.* art. 1718(4), at 678-79.

55. *Id.* Annex 1718.14, at 681.

56. Gonzalez, *supra* note 11, at 305.

57. Jordan, *supra* note 9, at 375-76.

58. *Id.* at 376.

59. John Riley, 'Gray Market' Fight Isn't Black and White, NAT'L L.J., Oct. 28, 1985, at 1, 1.

added demand associated with additional distribution channels, albeit unauthorized.⁶⁰ Developing countries, such as Mexico, have typically opposed actions to restrict parallel importing because parallel importing tends to decrease prices resulting from increased competition.

In contrast, developed countries such as Canada and the United States have traditionally favored prohibiting parallel importing to fully protect the rights of the trademark owner.⁶¹ Without NAFTA legislation, each party is forced to rely on the domestic laws of its trading partners to protect the interests of the parties own intellectual property rights.⁶² Even the U.S. trademark law provides little or no protection since the gray market goods are authentic and not subject to the Lanham Act, since a cause of action under the Lanham Act is not present when the offending product is authentic.⁶³ In addition to failing to address the problem of parallel importation, NAFTA grants a nullifying exception to Canada called the Cultural Industries Exclusion which exempts most print, film, video, music and television from NAFTA protections in Canada.⁶⁴

E. *The Cultural Industries Exclusion and Its Implications*

The Cultural Industries Exclusion is a NAFTA exclusion which allows Canada to shut out foreign competition in the print, film, music, radio and television industries.⁶⁵ But a stated NAFTA objective is to afford a member nation's foreign nationals the same treatment as their own nationals with regard to intellectual property protections.⁶⁶ Thus, this exclusion is protectionist in nature and inconsistent with the notions of fair trade and NAFTA in general.

Mexico, on the other hand, accepted NAFTA without bargaining for the Cultural Industries Exclusion. However, unlike Canada, Mexico does not

60. Jordan, *supra* note 9, at 377.

61. *Id.*

62. *Id.* at 376-77.

63. Section 1125(a)(1) of the Lanham Act provides in part:

Any person who . . . uses in commerce any word, term, name, symbol, or device . . . which —

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods . . . or

(B) in commercial advertising . . . misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125 (1994).

64. NAFTA, *supra* note 5, art. 2106, Annex 2106, at 701-02.

65. *Id.*

66. *Id.* art. 1703, at 671.

have an established computer industry.⁶⁷ Mexico obtains the bulk of its hardware and software from U.S. contracts and has no need to protect virtually nonexistent Mexican computer companies from foreign competition.⁶⁸ Therefore, the cultural industries exclusion may send a message to subsequent prospective member nations, such as Chile, that NAFTA intellectual property terms can be nullified by exception if the perceived adverse impact of foreign competition is too great.

Chile is currently negotiating for NAFTA entry.⁶⁹ Pharmaceutical patent protection is seen as a major hurdle for Chilean accession.⁷⁰ Chile extended pharmaceutical patent protection which led to criticisms that the extension would hurt local consumers by lengthening the monopoly period on many drugs resulting in higher prices over longer periods for protected drugs.⁷¹ In addition, Chile has a significant export business of generic pharmaceutical throughout Central America.⁷² Currently, Chile's patent protection for pharmaceuticals is fifteen years from the grant date.⁷³ Present NAFTA protection is seventeen years from the grant date.⁷⁴

The issue of the Chilean "pipeline protection" of pharmaceuticals is even more significant than patent protection periods. Chilean law currently fails to offer pharmaceutical patent protection for patents filed before September 30, 1991, the date of enactment of its domestic patent law.⁷⁵ NAFTA, on the other hand, recognizes retroactive patent protection by providing protection for the unexpired term of patents.⁷⁶ Chile must not be granted an exception to patent protection as an incentive to sign NAFTA, because of the need to maintain the integrity of the agreement. However, even gaining a country's approval of the comprehensive NAFTA provisions will provide little safeguards if NAFTA enforcement procedures are not followed.

F. Enforcement Concerns

Concern has been raised as to whether Mexican authorities will be adequately funded to identify and to prosecute intellectual property violators

67. *USA: A Law Onto Itself*, COMPUTING, June 16, 1994, at 48, available in WESTLAW, INT-NEWS database.

68. *Id.*

69. Helene Cooper & Jose de Cordobe, *Chile Is Invited to Join NAFTA as United States Pledges Free-Trade Zone for Americas*, WALL ST. J., Dec. 12, 1994, at A3.

70. Jordan, *supra* note 9, at 374.

71. Barbara Durr, *Chile Surrenders to United States Threat on Pharmaceutical Patent*, FIN. TIMES (London), Feb. 1, 1990, at 5.

72. *Id.*

73. *Id.*

74. NAFTA, *supra* note 5, art. 1709, at 673-74.

75. Jordan, *supra* note 9, at 374.

76. NAFTA, *supra* note 5, art. 1709, at 673-74.

in their own country.⁷⁷ Without adequate enforcement procedures, foreign investors may choose to invest elsewhere.⁷⁸ Recent Mexican economic troubles highlighted by the recent devaluation of the peso, further cast doubt on Mexico's ability to enforce intellectual property rights domestically. However, the Mexican Trademark Office has recently demonstrated the ability to take effective practical measures to enforce the intellectual property rights of foreign nationals.⁷⁹

Failure to enforce intellectual property rights not only hurts original manufactures, but can put consumers in life threatening situations. In India, Glaxo shut down its pharmaceutical plant for one week when it found local scrap dealers selling rejected products.⁸⁰ In Bangladesh, a number of children died three years ago after being administered cough syrup tainted with ethylene glycol.⁸¹ Although, India and Bangladesh are not NAFTA signatories, their experiences show the potential deadly consequences of tolerating counterfeit products.

IV. CONCLUSION

NAFTA affords the most expansive intellectual property protection ever offered by an international treaty. With the prospect for a Hemispheric-Wide Free Trade Area of the Americas Agreement targeted for the year 2005,⁸² the present NAFTA agreement should be quickly modified to add protection from parallel importation and to delete the harmful Cultural Industries Exclusion. The agreement needs to be uniform and embraced in its entirety by any nation entering the treaty. Otherwise, the exceptions can potentially eviscerate the rules.

Further, economic globalization is progressing with recent talk of a block uniting the European Union with the North American Free Trade Agreement

77. McKnight & Muggenburg, *supra* note 12, at 32.

78. *Chile: Reebok Calls Upon Latin American Leaders to Curb Trademark Piracy in Developing Countries*, Businesswire, Dec. 8, 1994, available in WESTLAW, INT-NEWS database.

79. *USA: Mexican Government Takes Action Against Violation of TGI Fridays Inc. Trademark*, Pr Newswire, Sept. 1, 1994, available in WESTLAW, INT-NEWS database. The Mexican Trademark Office ordered seizures of signs and materials which allegedly infringed on trademarks at 12 restaurants which operated under the name FREEDAY in various cities throughout Mexico. *Id.* The action was based on the confusing similarity between the T.G.I. Friday's mark and the FREEDAY mark. *Id.*

80. *Bargaining for Patent and Trademark Protection*, CHEMICAL ENGINEERING, Mar. 1, 1995, available in WESTLAW, 1995 WL 7911825.

81. *Id.*

82. *Policy: Rep. Crane Says Trade Panel Agenda Includes Chile, NAFTA, China, Fastrack*, INT'L TRADE DAILY (BNA), Jan. 11, 1995, available in WESTLAW, BNA-BTD database.

members.⁸³ Globalization is very significant since most potential U.S. economic growth lies outside our borders.⁸⁴ Investment in foreign economies requires adequate protection from intellectual property pirates to encourage the capital expenditures. NAFTA's extensive protection of intellectual property rights should be implemented in its entirety along with an added provision for parallel importation protection as a baseline document for any future global economic alliance. NAFTA lays the groundwork for an unprecedented export boom and for decades of economic growth and prosperity.

83. *USA: Idea Simmering on Joining NAFTA with European Union*, Reuter Newswire, June 1, 1995, available in WESTLAW, INT-NEWS database.

84. See Kantor, *supra* note 1.

